

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

BRENT MILBURN

Claimant

VS.

BOEING MILITARY AIRPLANES

Respondent

AND

AETNA CASUALTY & SURETY COMPANY

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 168,073

ORDER

The respondent and its insurance carrier requested a review of the Award of Administrative Law Judge Shannon S. Krysl entered in this proceeding on June 10, 1994.

APPEARANCES

The claimant appeared by his attorney, Paul Hogan of Wichita, Kansas. The respondent and its insurance carrier appeared by their attorney, Frederick L. Haag of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas. There were no other appearances.

RECORD

The record considered by the Appeals Board is enumerated in the Award of the Administrative Law Judge.

STIPULATIONS

The stipulations of the parties are listed in the Award of the Administrative Law Judge and are adopted by the Appeals Board for this review.

ISSUES

The Administrative Law Judge found claimant entitled to permanent partial general body disability benefits based upon a thirty-seven percent (37%) work disability. The respondent and insurance carrier requested the Appeals Board to review the finding of the nature and extent of disability and contend a later injury, rather than the alleged work-related accident of May 15, 1992, is responsible for claimant's ultimate impairment and disability. Because respondent's counsel announced that the respondent and insurance carrier have reached agreement with the Workers Compensation Fund regarding Fund liability, the only issue now before the Appeals Board is the nature and extent of disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

For the reasons expressed below, claimant is entitled to receive benefits based upon a thirty-seven percent (37%) permanent partial general disability as a result of his work-related accidental injury on May 15, 1992, and the Award of the Administrative Law Judge should, therefore, be affirmed.

The findings and conclusions of the Administrative Law Judge are accurate and are adopted by the Appeals Board for purposes of this review, except to the extent they are inconsistent with those findings specifically set forth below.

On May 15, 1992, claimant injured his left shoulder while working for the respondent. After reporting to Boeing's Central Medical and visiting St. Joseph's emergency room, claimant ultimately sought treatment from board-certified surgeon Jay Stanley Jones, M.D. After a period of conservative treatment, Dr. Jones operated on claimant's left shoulder on July 2, 1992 and performed a resection of the distal clavicle with debridement. After a period of recuperation, claimant requested he be permitted to work and was given a release to return to work on light duty. Because of a mistake on claimant's medical release form, respondent believed claimant had been absent without leave and advised him he would be terminated. Claimant thereupon chose to forego the termination process and voluntarily quit.

After his termination, claimant obtained employment as a finish spray painter at FEMCO in Mc Pherson. At this time, claimant's only restriction from Dr. Jones was to perform no overhead work, which claimant did observe. For this employer, claimant primarily used his right hand and did not have to use his left arm or shoulder. In mid-October 1992, claimant reached for a chair at home and experienced severe pain in his left shoulder. Because he was unable to work the next day because of his shoulder symptoms, the claimant sought treatment at the emergency room in Mc Pherson and was referred back to Dr. Jones.

Dr. Jones again diagnosed left shoulder impingement. After a period of conservative treatment, Dr. Jones reoperated on claimant's left shoulder on December 29, 1992. During this operation, Dr. Jones checked for a tear in the rotator cuff, which he did not find, and decompressed the acromion. Dr. Jones believes the impingement syndrome claimant had during this period was not a new injury, but a continuation of the initial injury that claimant experienced while working for respondent in May 1992. He believes this

impingement syndrome was more likely the result of gradual onset versus traumatic injury. Based upon the testimony of Dr. Jones, as well as the mechanics of injury as described by the claimant, the Appeals Board finds the flare-up of symptoms in October 1992 and the resultant surgery and ultimate restrictions and limitations are part and parcel of the initial injury sustained while working for the respondent on May 15, 1992. The Appeals Board finds that claimant did not sustain a second accidental injury when he was reaching for a chair at home in October 1992.

As a result of claimant's left shoulder injury, claimant has permanent impairment of function to the body as a whole and should observe the permanent work restrictions and limitations of no overhead work; no lifting more than forty (40) pounds; and limited pushing, pulling and grasping. These restrictions from Dr. Jones are uncontroverted. At the time of regular hearing, claimant was working as a mechanic's helper in a temporary position for the Department of Defense and earning \$7 per hour.

Claimant presented the testimony of labor market expert Jerry D. Hardin, who testified claimant has lost approximately sixty-five to seventy percent (65-70%) of his ability to perform work in the open labor market, utilizing the restrictions of Dr. Jones and assuming claimant had no prior restrictions. Also, Mr. Hardin testified claimant has a fifty-three percent (53%) loss in his ability to earn a comparable wage. The respondent presented the testimony of vocational rehabilitation expert Karen Terrill, who believes claimant has lost ten percent (10%) of his ability to perform work in the open labor market and twenty-two percent (22%) loss of ability to earn a comparable wage as a result of his ultimate work restrictions and limitations. After considering the testimony of both experts, the Administrative Law Judge found claimant sustained a thirty-seven percent (37%) work disability due to his work-related accident.

Although it is arguable that a different percentage of work disability could be derived, it is apparent the Administrative Law Judge considered the percentages of loss provided by both labor market experts to determine claimant's losses of ability to perform work in the open labor market and ability to earn a comparable wage. The Appeals Board finds the analysis of the Administrative Law Judge to be reasonable and the work disability of thirty-seven percent (37%) to be within the actual and reasonable range of loss and, therefore, adopts such finding and conclusion as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated June 10, 1994, should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Paul Hogan, Wichita, KS
Frederick L. Haag, Wichita, KS
Edward D. Heath, Jr. Wichita, KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director